Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

INTERNATIONAL MEDICAL GROUP, INC.,

Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The doctrine of "arbitral immunity" has developed over four decades of federal circuit court jurisprudence without any review by the Supreme Court. Under a host of fact patterns involving various legal and equitable claims asserted and barred by the doctrine, the several circuits have developed conflicting standards for application of the doctrine. This case presents an altogether unique situation as well, in that it involves a party injured by "arbitral actions" who has not contractually agreed to arbitrate any dispute, but nevertheless has been denied all judicial remedies, both legal and equitable, against the arbiter in the face of a direct challenge by the arbiter to seek judicial relief.

Thus, the questions presented are whether arbiters and arbitral sponsoring organizations are entitled as a matter of law (rather than by contract) to "immunity" from lawsuits and, if so:

1. to what extent (absolute or qualified) and under what legal standard;

2. whether the immunity applies in a lawsuit filed by a person not a party to any arbitration agreement who seeks the recovery of damages, injunctive relief and declaratory relief; and

3. whether the immunity should be deemed waived as a result of a direct challenge by the arbiter to the non-contracting party to obtain a court-ordered stay of further proceedings by the arbiter.

STATEMENT PURSUANT TO RULE 29.6

Petitioner International Medical Group, Inc. ("IMG") states that it has no corporate parents and, except for Sirius International Insurance Corporation (publ)(which holds approximately 11% of IMG's stock), no publicly held company owns 10% or more of IMG's stock.

Sirius International is not participating in the filing of the Petition for a Writ of Certiorari, and is being served as a Respondent herein.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's entry of May 25, 2001 (per Barker, D.J.), granting respondent's (and others') motion to dismiss is published at 149 F. Supp. 2d 615 (Appendix C, 27a-58a). The district court's subsequent entry of July 26, 2001, granting certain other defendants' motion to dismiss is published at 2001 WL 984808. The district court's entry of judgment on July 26, 2001, is not otherwise published (Appendix B, at 25a-26a). The court of appeals' opinion (per Rovner, C.J., joined by Diane P. Wood, C.J., and Evans, C.J.) affirming the district court's judgment is published at 312 F.3d 833 (Appendix A, at 1a-24a). The court of appeals' order denying rehearing and rehearing en banc (Appendix D, at 59a-60a) is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on December 3, 2002, and denied rehearing and rehearing en banc on January 8, 2003. On April 2, 2003, Justice Stevens extended the time to file this petition for a writ of certiorari to and including June 6, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The doctrine of arbitral immunity has developed entirely as judge-made law. There are no statutory provisions directly relevant to the issues raised in this petition.

STATEMENT OF THE CASE

Petitioner International Medical Group, Inc. ("IMG"), is an Indiana corporation and acts as a disclosed agent for a disclosed principal, Sirius International Insurance Corporation (publ) ("Sirius"), headquartered in Stockholm, Sweden.[1] IMG is licensed by the state

1. Although a party to the district court and appellate proceedings below, Sirius does not participate in the filing of this petition.

of Indiana to provide agency and administrative services in connection with various international health and medical insurance products, and acts as managing general underwriter and claims administration agent for Sirius on many of the international insurance plans Sirius underwrites as carrier.

In September of 1998 Michael Ogdon submitted to IMG (through an independent insurance agent/broker) an application for health insurance coverage from Sirius. At the time of his application, Ogdon was a citizen of Great Britain and a resident of Vancouver, British Columbia, Canada. In its role as agent for Sirius, IMG accepted the application and bound Sirius to the requested coverage, and issued an insurance certificate to Ogdon providing international health coverage for an initial one-year period.

In his application for insurance Ogdon failed to disclose the existence of certain pre-existing health conditions, as required. Even so, under the terms of the certificate, medical charges incurred for pre-existing conditions were expressly excluded from coverage for the first two years under the plan. In addition, by their contract Sirius and Ogdon agreed that misrepresentations and omissions in the application, as well as fraudulent claims, would void the insurance contract and constitute a forfeiture of all benefits.

Soon after placement of the insurance coverage, Ogdon sought and received medical treatment in Florida relating to his pre-existing conditions and submitted the medical bills to Sirius, through IMG as the plan administrator, requesting payment. Upon investigation and review of the charges and relevant medical records, the claims were denied in total by Sirius pursuant to the exclusion for pre-existing conditions.

Among other efforts undertaken to obtain coverage for the claims, Ogdon filed a complaint against IMG with the Indiana Department of Insurance, and initiated an arbitration proceeding against both IMG and Sirius with the American Arbitration

Association ("AAA").[2] The insurance contract between Ogdon and Sirius includes the following provision:

> If any dispute shall arise as to the amount to be paid under this insurance (liability being otherwise admitted), such dispute shall be referred to arbitration in accordance with procedures of the American Arbitration Association.

Complaint, ¶ 28, Ex. B, *Cert. of Insurance*, pp. 2-3, § B(16).

Upon receipt of the arbitration demand, IMG notified the AAA of the absence of any contract or agreement to which IMG was a party, and challenged the authority of the AAA to exercise "jurisdiction" over IMG and to order IMG to participate in the arbitration.[3]

A series of correspondence subsequently ensued regarding the propriety and administration of the arbitration, pursuant to which the AAA ordered IMG to participate in an arbitration to be held in Miami, Florida, to pay administrative fees to the AAA and make a deposit of compensation to the as yet unselected arbitrator, and to perform certain other tasks and undertakings. Despite further challenges by IMG to the AAA's asserted authority and jurisdiction over it, the AAA ignored the lack of any contractual agreement on the part of IMG, and counter-challenged IMG by declaring "the Association will proceed forward in this matter in the absence of . . . a court order staying this matter [and] the arbitrator [in Florida] shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." *Complaint*, Exs. L, R. In addition, the AAA ruled that "[t]his case will be administered

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2. IMG timely replied to Ogdon's consumer complaint to the Indiana Department of Insurance, who apparently accepted the reply and found no wrongdoing or impropriety of any kind, and took no further action with respect to the complaint.

3. Sirius likewise challenged the propriety of the arbitration due to the failure of the contractual condition precedent thereto, as Ogdon had acknowledged in his arbitration petition that Sirius had admitted no liability for any of the medical claims. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

under the Association's Rules . . ." and that compensation for the Florida-based arbitrator was an "independent obligation" of IMG. The AAA ordered IMG to "promptly make such deposits with the [AAA] as required by the appointment [of the arbitrator]. . . ." *Complaint*, Exs. H, S.

Faced with this Hobson's choice of demands and orders, and having been twice challenged by the AAA that it would proceed with the arbitration absent a court order staying the matter, IMG (and Sirius) initiated this action by filing a complaint in Indiana state court, which was subsequently removed to federal court.[4]

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4. As a result of Ogdon's unilateral act of naming IMG as a "party" to the arbitration, and the AAA's insistence that it would proceed absent a stay against it, IMG had been placed in a legally perilous lose-lose situation that required it to seek affirmative relief from a court of law. It could neither risk default through a failure to participate in the arbitration after "notice," nor risk a claim of waiver to challenge the propriety of the arbitration by voluntarily participating. IMG could not allow the arbitrator to decide the arbitrability issue (notwithstanding his inherent conflict of interest in the decision) because if the decision was adverse to IMG, Ogdon could then have asserted IMG "waived" its objection to jurisdiction by allowing the issue to be so decided. *See, e.g., Ficek v. Southern Pac. Co.*, 338 F.2d 655, 656-657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965) (plaintiff, after participating in arbitration while challenging arbitrability, attempted to collaterally attack arbitration award against him as being made "without jurisdiction" and lacking "essential fairness." *Held*: An agreement to arbitrate a particular issue may be implied from the conduct of the parties, and if the issue of arbitrability was in fact submitted to the arbitrator, such action would evince a subsequent agreement for private settlement which would cure any defect in the arbitration clause, thereby waiving any right to challenge the decision. "A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act"); *accord, Fortune, Alsweet and Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1356-1357 (9th Cir. 1983); *Jones Dairy Farm v. Local No. P-1236, et al.*, 760 F.2d 173, 175-176 (7th Cir. 1985).

On the other hand, had IMG "done nothing" and intentionally failed to participate in the Florida arbitration proceedings after receipt of notice

(Cont'd)

1. IMG's complaint against the AAA was in three counts.[5] Count I sought damages for actions of abuse of process, malicious prosecution and "bad-faith arbitration" based in substantial part upon allegations: that IMG was not a party to the insurance contract or to any other arbitration agreement; that the AAA had no jurisdiction, control or authority over IMG; and that the AAA had a direct economic stake and inherent conflict of interest in the maintenance of the arbitration proceedings, which had been brought in bad faith, were frivolous, unreasonable and groundless, and were being pursued maliciously and for an ulterior purpose and motive.

(Cont'd)
and demand from the AAA to do so — on the assumption that it could simply challenge any future action to confirm an adverse award on jurisdictional grounds — IMG would have been subject to default by Ogdon and the arbitrator, and Ogdon could then have argued in an enforcement action that IMG had waived the ability to subsequently challenge an award entered against it in its absence due to its intentional failure to appear. *See, e.g., Sheet Metal Workers Intern. Ass'n, et al. v. Power City Plumbing & Heating, Inc.*, 934 F.2d 557, 561 (4th Cir. 1991) (arbitration award is valid and fully enforceable against non-participating, subsequently-complaining party who is served with proper notice and was aware of the arbitration proceedings); *accord, Sheet Metal Workers v. Tampa Sheet Metal Co., Inc.*, 786 F.2d 1459, 1460 (11th Cir. 1986); *Syncor Intern. Corp. v. McLeland*, 120 F.3d 262 (Table, Text in Westlaw), unpublished disposition, 1997 WL 452245 (4th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998). *Cf., MCI Telecommunications Corp. v. Exalon Industries, Inc.*, 138 F.3d 426, 429-430 (1st Cir. 1998); *Comprehensive Accounting Corp. v. Rudell*, 760 F.2d 138, 139-140 (7th Cir. 1985).

Without supporting evidence in the record or opportunity for rebuttal, the Seventh Circuit unfairly characterized IMG's reaction to this predicament as "curious" and "strange," in violation of the applicable 12(b)(6) standard of review requiring implications arising from the complaint to be construed favorably to IMG. *See*, Appendix A, at 4a-5a, FN 1, and at 12a.

5. Discussion of the proceedings below will be limited to the matters relevant to this petition.

Complaint, ¶¶ 31-37. Count II requested injunctive relief against the AAA to enjoin it from proceeding further with administration of the arbitration. *Complaint*, ¶¶ 38-39. Finally, Count III requested declaratory relief concerning the respective rights and interests of IMG and the AAA in order to judicially determine the challenged "jurisdictional" issues and the prior orders and directives of the AAA, including declaratory relief with respect to the monetary liabilities and obligations allegedly owed by IMG to the AAA. *Complaint*, ¶¶ 40-41.

2. The state court granted IMG's *ex parte* request for a temporary restraining order, and after notice and a hearing subsequently granted IMG's request for a preliminary injunction against the AAA, entering findings and conclusions on several of the factual and legal matters raised in Counts II and III of the complaint. The lawsuit was then removed to federal district court, and the AAA moved to dismiss IMG's claims under Rule 12(b)(6) for failure to state a claim. Specifically, the AAA argued the court lacked jurisdiction over the AAA because it was an "unnecessary defendant" whose presence was tangential to IMG's claims for relief against it, and that the AAA enjoyed arbitral immunity against all of the claims. In the alternative to its immunity argument, the AAA asserted the complaint lacked the factual basis necessary to support the substantive claims asserted by IMG.

3. The district court began its analysis by reviewing the internal rules and procedures of the AAA, which include the following provisions under Rule 50:

> (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary party in judicial proceedings relating to the arbitration.
>
> * * *
>
> (d) Neither the AAA nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules.

Appendix C, at 45a, citing Mot. to Dismiss of AAA [], Brown Aff., Ex. 1, American Arbitration Association, Commercial

Dispute Resolution Procedures (Including Mediation and Arbitration Rules), as amended and effective on January 1, 1999, R-50(b), (d). The district court correctly noted, however, that only Sirius and Ogdon had agreed to adopt these rules by their contract, and that IMG had disputed from the outset of the controversy that it was bound to arbitrate or bound by those rules. Accordingly, the district court held the scope of any "release" to be imposed upon IMG under the rules was an "issue of fact" that could not be resolved on the motion to dismiss. *Id.*, at 46a.

4. Turning to the merits of the AAA's alternative substantive arguments, the district court analyzed the AAA's assertion that it was an "unnecessary party" to the litigation with respect to determining the propriety of the arbitration because it had no interest in the underlying medical claims coverage dispute, and, citing public policies and prior case law, hypothesized that the Indiana Supreme Court would look favorably upon the doctrine of arbitral immunity to the extent IMG's claims against the AAA implicated such interests. *Id.*, at 46a-48a.

5. The district court's analysis also took into consideration the Seventh Circuit's decision in *Caudle v. Am. Arbitration Ass'n*, 230 F.3d 920 (7th Cir. 2000) to resolve ultimately the question of immunity. *Id.*, at 48a-50a. Recognizing that *Caudle* had been finally decided on subject matter jurisdictional grounds, the district court focused on Judge Easterbrook's proposed hypothetical, in dicta, in which the AAA could "neither enjoy immunity nor assert that it was not a real party in interest:"

> Suppose Caudle had paid the full $9,200 the AAA specified, and the Association had pocketed the money without arbitrating the dispute; it is unlikely that the AAA could claim 'immunity' in response to a demand for a refund (or an order to furnish the arbitration service for which it had been paid).

Caudle, at 922. Based on this hypothetical, the district court determined that a claim asserting an independent cause of action against the arbitral body contending liability arising separately and

distinct from proceedings resolving the underlying dispute of the parties to the arbitration contract would *not* be subject to the proposed immunity, and would be one in which the organization is a real party in interest. Appendix C, at 49a. In disregard of IMG's allegations concerning the separate direct financial stakes of the AAA and its arbiters in the maintenance of the proceedings, the district court concluded the AAA had "no interest" in IMG's claims under Counts II and III, and was therefore not a "necessary party" to a fair and complete resolution of those claims, and on such bases dismissed those claims. However, because the district court found IMG's tort-damage claim under Count I to be analogous to the *Caudle* hypothetical, the court found the AAA's contention that it was unnecessary to Count I as "unavailing" in that it might have liability separate from and independent of that of the other defendants. *Id.*, at 50a.[6]

6. In ultimately dismissing Count I, the district court held that IMG had not properly alleged a claim for malicious prosecution (or wrongful use of civil proceedings); determined that IMG's claim styled "bad faith arbitration" was akin to one for abuse of process;[7] and, after setting out the elements for an abuse of process claim, determined that there was no "process" that had been employed by the AAA against IMG, and on that basis dismissed Count I for failure to state a claim. *Id.*, at 51a-57a.[8]

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6. In making this ruling, the district court stated:

> Since we conclude, *infra*, that none of the allegations in Count I state a claim for relief as against the AAA, we need not determine whether it would enjoy arbitral immunity from them as a matter of law. However, the reasoning found in *Caudle* implies that *no per se immunity would exist.*

(Emphasis added) *Id.*, FN 6.

7. Apparently, the claim should have been styled "wrongful exercise of jurisdiction." *See* FN 17, *infra.*

8. The district court cited no authority in support of its conclusion the AAA had not employed "process."

7. On appeal of the dismissals to the Seventh Circuit, the appeals court focused solely upon the issue of arbitral immunity and its relevant parameters to decide the case with respect to the AAA. The appeals court began by recognizing that arbitration is strictly a matter of contract, and a party "'cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" Appendix A, at 12a, citing *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

> This is because arbitrators derive their authority to resolve disputes from the prior agreement of the parties to submit their grievances to arbitration. *AT&T*, 475 U.S. at 648-49. But it is not the responsibility of the AAA or even the arbitrator to determine whether a particular agreement creates a duty for the parties to arbitrate a particular grievance. *AT&T*, 475 U.S. at 649. Unless the parties clearly and unmistakably provide otherwise, the question of arbitrability is to be decided by a court, not by an arbitrator. *Id.*

Appendix A, at 12a-13a. Without regard to IMG's objection to the arbitration in the face of no agreement to arbitrate, the Seventh Circuit's opinion nevertheless stakes out a position remarkable for its ambivalence to the principles established by this Court in *AT&T*:

> Once IMG objected to the arbitration, the AAA had only two choices, *to proceed or not to proceed*. The AAA proceeded after determining that its filing requirements had been met and after informing IMG that it could ask a court to determine the arbitrability of the matter.
>
> * * *
>
> Until [such time as IMG obtained a court order staying the arbitration], the AAA *was well within it rights* to proceed with the arbitration. . . (Emphasis added)

Id., at 13a. Nowhere in its opinion does the Seventh Circuit fully identify the "rights" which the AAA supposedly enjoyed over IMG, but they apparently included the right to assert "independent" monetary obligations owed by IMG to the AAA for administrative fees, the right to demand the pre-payment of arbitrator compensation deposits at rates up to $275 per hour and $2,000 per day, the right to order IMG to travel to Miami, Florida, the right to determine, internally and unilaterally, that "its filing requirements had been met" despite the lack of any agreement or consent of IMG, and the right to suggest IMG "raise this issue with the arbitrator at or prior to the hearing." *See*, *Complaint*, Exs. H, L, R, S. Missing also from the Seventh Circuit's decision is any explanation or citation indicating from what authority such "rights" derive or emanate, there being no reference to any constitutional penumbras or to any federal or state statutes.[9] Finally, lacking was any discussion of the courses of action available *to Ogdon* had the AAA chosen to follow the second of its available options: the choice *not to proceed* with the arbitration in the face of IMG's challenge.[10]

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9. The Seventh Circuit's reference to the existence of affirmative "rights" in favor of arbiters over private citizens (beyond the mere "right" to immunity from suit) crossed a new threshold within arbitral immunity jurisprudence by raising an issue previously unchartered by any precedent.

10. IMG submits this entire controversy could have been avoided had the AAA chosen this second option, for it would then have been up to Ogdon to decide whether to file a court action to "compel" IMG to arbitrate. *See*, *e.g.*, 9 U.S.C. § 4; Indiana Code § 34-57-2-3(a). Without a contract agreeing to arbitration, however, surely Ogdon would have been dissuaded from pursuing the matter against IMG further, as any suit to compel would have been subject to summary disposition in IMG's favor under *AT&T*. More than three years ago, in correspondence dated April 12, 2000 (Complaint, Ex. M), IMG requested the AAA to "[p]lease state the legal and factual basis upon which the Association has determined and concluded that it has authority, control or other personal jurisdiction over IMG." To this day, IMG has received no response from the AAA, the district court, or the Seventh Circuit Court of Appeals.

8. The appeals court cited several prior circuit court decisions dealing with the arbitral immunity doctrine, and indicated the cases "uniformly support arbitral immunity in situations such as occurred here." Appendix A, at 13a-15a, citing its prior decision in *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977), and decisions from the First, Fifth, Eighth and Second Circuits (*none of which* involved claims against an arbiter asserted by a non-contracting party).[11] Noting that "arbitrators have no interest in the outcome of the [underlying] matter," *Tamari*, 552 F.2d at 781, the appeals court opined:

> IMG or any party to an arbitration can obtain relief by seeking a stay against the party bringing the arbitration. There is no need to seek a stay against the sponsoring organization. *Tamari*, 552 F.2d at 781.

Appendix A, at 14a.

9. Notwithstanding the acknowledged and required 12(b)(6) standard of review to construe IMG's complaint liberally in favor of IMG, and to accept as true all well-pled allegations and any inferences that may be reasonably drawn from them, the appeals court concluded its analysis by adopting a strained explanation of Judge Easterbrook's prior *Caudle* hypothetical, by simply ignoring many of the well-pled allegations of IMG's complaint, and by concluding based on spotty authoritative support that the injurious actions of the AAA, including its assertion of debts owed and demands for pre-payment of fees, were mere "administrative mistakes," for which IMG's "appropriate remedy" was to:

> . . . seek injunctive relief against [Ogdon] in an appropriate court. The AAA need not be a party to that action and should be spared the burden of

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11. *New England Cleaning Servs., Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999); *Hawkins v. National Ass'n of Sec. Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998); *Olson v. National Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 883 (2nd Cir 1990), *cert. denied*, 498 U.S. 850 (1990).

> litigating the appropriateness of *its exercise* of jurisdiction.
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> * * *
>
> . . . the AAA did nothing more than docket a properly filed demand for arbitration [and] the AAA did not abuse the process when it declined IMG's invitation to determine that the arbitration should not go forward. In sum, the AAA neither initiated nor caused to be initiated any process at all, and thus can not be held liable for abuse of process.

(Emphasis added) *Id.*, at 16a-18a.[12] In sum, the appeals court held the "AAA is immune from a suit based on wrongful exercise of jurisdiction . . . [and] . . . enjoys immunity from suit" under the circumstances pled by IMG in its complaint. *Id.*, at 17a, 18a.

10. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for three reasons. *First*, the Seventh Circuit's decision conflicts with prior holdings and legal principles established by this Court, and adopts a standard for "arbitral immunity" that conflicts with the standards employed by other circuits, of which there are several. It espouses the legal principle that a private person or entity who has made no jurisdictional contract to arbitrate a dispute and given no consent or authority to any arbitrator, is left with no remedy either in law or in equity to recover economic damages caused by the arbitrator while acting in clear absence of jurisdiction, or to enjoin him from further pursuit of the proceedings, or to declare the parties' respective rights and interests when faced with assertions of

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12. The appeals court did not identify the legal theory under which IMG could recover damages caused by the AAA via "injunctive relief" against Ogdon, nor did it explain how, in such an action, if the AAA was not a party, IMG could have sought and had declared the respective rights and interests of IMG and the AAA with regard to the financial obligations established and asserted solely by the AAA.

independent debts owed and monies due arising from a frivolous demand for arbitration launched ultimately as part of an underlying fraud. That holding is contrary to the principles established in this Court's decisions in *AT&T* and *First Options*, *supra*, which hold that arbitration is entirely a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The Seventh Circuit's decision also holds that private arbitral sponsoring organizations, arbitrators, and their respective staffs and employees are all entitled to absolute immunity from suit based on a wrongful exercise of jurisdiction, notwithstanding a clear absence of jurisdiction. That holding is contrary to the principles established in this Court's decisions in *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) and *Mireles v. Waco*, 502 U.S. 9 (1991), which explicitly recognize an exception to the doctrine of judicial immunity when a judge acts in clear absence of all jurisdiction. Finally, the Seventh Circuit's decision creates a new, broad, absolute standard for the doctrine of arbitral immunity that does not square with the standards used and developed in the First, Second, Fifth, Sixth, Eighth, and Ninth circuits, and crosses new boundaries in American law by announcing affirmative "rights" in favor of arbiters over private citizens, thereby making application of its decision among the circuits unworkable. Because this Court has never reviewed the doctrine of arbitral immunity spanning more than forty years of developing circuit court jurisprudence, the time is ripe for a comprehensive review by this Court in light of the circumstances of this case.

Second, the Seventh Circuit's decision violates constitutional principles of due process and equal protection of the laws by denying IMG any legal or equitable remedies against another private party that has caused it economic harm, that has ordered the payment of money to and for the benefit of itself and unrelated third persons, and that has demanded IMG undertake other actions amounting to involuntary servitude. The decision grants special, sweeping privileges and immunities to an undefined and unregulated group of private individuals and entities who participate in an occupation called "arbitration," and whose membership in the group arises solely as a

result of their own pronouncement they are a member of the group, thereby trampling upon the long-established American principle that no man is above the law. Review should be granted to correct these errors, and to prevent future or further wrongs to be committed by members of the group.

Finally, the appeals court's decision, as a practical matter, opens wide the doors to permissible unchecked bias and prejudice within the realm of alternative dispute resolution — operating otherwise as a necessary counter-balance and avenue of relief to the over-burdened judicial system — and authorizes: unfettered abuse of forum selection tactics on a national level; frivolous and harassing "arbitral" litigation against innocents by international defrauders and extortioners; and illegitimate claims to "immunity" by collusive or unscrupulous arbiters in the face of outdated or changing public policy concerns that may no longer be relevant.

I. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions Of This Court And Of Other Circuits.

The claims for recovery of damages and for injunctive and declaratory relief asserted by IMG in its complaint against the AAA arise separately from the underlying insurance coverage dispute between Ogdon and Sirius, notwithstanding IMG's role as plan administrator. Rather, IMG's claims stem from acts and omissions undertaken by the AAA and its employees and staff members during the AAA's "administration" of the arbitration demand filed by Ogdon. As the Seventh Circuit indicated, the AAA could very easily have elected not to proceed against IMG. However, when the venerable AAA for its own account and for the account of its affiliated arbiters sends written communications to a neutral company claiming jurisdiction over it and ordering the company to do things against its will, asserting that monetary obligations are owed and demanding payment of funds by the company, and causing economic harm to the company in the process, such actions create controversies solely between the AAA and the neutral company. IMG has no lawful

recourse for these matters against Ogdon, and attempts to do so would expose IMG to claims of frivolity. The Seventh Circuit's holding asserts nonetheless that the AAA and its employees are without exception immune from any lawsuit based on a wrongful exercise of jurisdiction, relying on a history of cases formulating the doctrine of arbitral immunity as applied to persons who, unlike IMG, had voluntarily entered into arbitration agreements.

This Court has consistently recognized that arbitration is a matter of contract, and a person can not be required to submit to arbitration any dispute which he has not agreed to so submit. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49 (1986), quoting *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). While acknowledging these precedents, everyone involved in this case — Ogdon, the AAA, the District Court, and the Seventh Circuit — has recognized that IMG is not and has never been a party to any arbitration agreement relevant to this case.

Based on the prior decisions of this Court, it follows logically that if arbitration is solely a creature of voluntary contract, and if there exists no contract between an injured party and an arbiter who causes the injuries, then no concepts of arbitral immunity can arise or be imposed upon the non-contracting injured party. The decision below violates the principles established by this Court. Because all parties agree there is a clear and unmistakable absence of any arbitration agreement, the Seventh Circuit's imposition of immunity in favor of the AAA and against IMG should be reviewed by this Court to determine whether the doctrine of arbitral immunity applies under the facts of this case.

In addition to determining the applicability of the arbitral immunity doctrine in this case, this Court should grant the petition to resolve the deepening conflicts among the circuits with respect to the varying standards used to apply the arbitral

immunity doctrine. In the face of IMG's allegations, the Seventh Circuit's decision appears to be a broad grant of truly "absolute" immunity to the AAA, without exception. Despite IMG's claims of wrongful exercise of jurisdiction and acts undertaken in the clear absence of any jurisdiction, the appeals court has implemented a standard exceeding even the limits of immunity established by this Court with respect to the administration of justice and the carrying out of public functions generally, and in direct conflict with the standards for the grant of arbitral immunity as established by other circuit courts of appeal.

In *Mireles v. Waco*, 502 U.S. 9 (1991) (*per curiam*), this Court recognized a long line of precedents acknowledging the *general* rule that a judge is immune from a suit for money damages. *Id.*, at 9-10, and cases cited. However, in *Mireles* the Court recognized that judicial immunity is not entirely absolute, and may be overcome in two distinct sets of circumstances:

> First, a judge is not immune from liability for non-judicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Forrester v. White*, 484 U.S. [219], at 227-229, 108 S.Ct., at 544-545 [(1988)]; *Stump v. Sparkman*, 435 U.S. [349], at 360, 98 S.Ct., at 1106 [(1978)]. Second, a judge is not immune for actions, *though judicial in nature*, taken in the complete absence of all jurisdiction. *Id.*, at 356, 357, 98 S.C., at 1104-1105; *Bradley v. Fisher*, 13 Wall., at 351.

(Emphasis added) *Mireles*, 502 U.S. at 11-12. Because the judge-made doctrine of arbitral immunity is based to a large extent, if not entirely, upon the judge-made law of judicial immunity (such history is discussed in more detail, *infra*, Section III), it follows logically that the bounds of arbitral immunity as established by the circuit courts cannot exceed the bounds of judicial immunity as established by this Court. Because the Seventh Circuit's decision recognizes no exception to the doctrine of arbitral immunity — even in the complete absence of all jurisdiction or for actions not taken in the arbiter's

arbitral capacity (*AT&T* dictates there can be no such capacity without contractual consent) — the petition should be granted in order for this Court to make clear the circumstances under which the grant of arbitral immunity may be overcome. For if a judge is not immune for actions taken in the complete absence of all jurisdiction, and if the AAA has no jurisdiction in the complete absence of any contract entered into by IMG, then claims arising from the actions of the AAA taken without lawful capacity and in complete absence of all jurisdiction should not be suppressed or barred by a grant of immunity. If this is not so, then this Court's limitations regarding immunity have no true effect, its words have no true meaning, and one can conceive of no set of facts beyond the facts of this case where any exception to arbitral immunity would apply.

In *New England Cleaning Services, Inc. v. American Arbitration Ass'n*, 199 F.3d 542 (1st Cir. 1999), the First Circuit Court of Appeals held that arbitral immunity applies in favor of arbiters and arbitral sponsoring organizations "unless there is a 'clear absence' of jurisdiction." *Id.*, at 545-546, citing this Court's decision in *Stump v. Sparkman*, *supra*, and its own prior decision in *Cok v. Cosentino*, 876 F.2d 1, 2 (1st Cir. 1989) (same holding). Although the Seventh Circuit cited *New England Cleaning* in support of the positions it took in this case, including a parenthetical referral to the First Circuit's express limitation upon the application of the doctrine, the appeals court conspicuously failed to apply the qualified standard to IMG's claims.

In *Honn v. National Ass'n of Securities Dealers, Inc.*, 182 F.3d 1014 (8th Cir. 1999), the Eighth Circuit Court of Appeals focused more narrowly upon the particular arbitral acts and functions complained of, and held that arbitral immunity would apply only if the arbiter "was performing functions *that were necessary* to arbitration administration at the time of the alleged wrongdoing, and [if such] acts were *within the scope* of the arbitral process . . . [and] . . . were taken while . . . carrying out its *normal administrative functions*." (Emphasis added)

Id., at 1017-1018. Yet in this case we know the AAA had *the choice* to proceed or not to proceed, as acknowledged by the Seventh Circuit. It therefore cannot be said that its actions against IMG were *necessary* to the administration of the proceeding — an element required by *Honn* — or that such actions were undertaken "within the scope" of "normal" administrative functions that require the existence of an explicit contractual submission to initiate the proceedings. Prior to *Honn*, the Eighth Circuit had ruled simply that arbitral immunity protects "all acts within the scope of the arbitral process," *see*, *Olson v. National Ass'n of Securities Dealers*, 85 F.3d 381, 383 (8th Cir. 1996), and the Second Circuit has applied a similar standard, but only so long as the functions performed are part of a "*contractually agreed upon* arbitration proceeding." (Emphasis added) *Austern v. Chicago Bd. Options Exchange, Inc.*, 898 F.2d 882, 886 (2nd Cir. 1990), *cert. denied*, 498 U.S. 850 (1990).

In *Hawkins v. National Ass'n of Securities Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998), the Fifth Circuit Court of Appeals held that an arbitral sponsoring body enjoys arbitral immunity from civil liability for the acts of its arbitrators arising "in the course of conducting *contractually agreed-upon* arbitration proceedings." (Emphasis added) *Id.*, at 332.[13]

In the Ninth Circuit arbitrators are immune from civil liability "for acts *within their jurisdiction* arising out of their arbitral functions in *contractually agreed upon* arbitration *hearings*." (Emphasis added) *See United States v. City of Hayward*, 36 F.3d 832, 838

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13. For reasons unknown, the circuit court in *Hawkins* did not cite its earlier opinion in *E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978). In *Ernst*, the Fifth Circuit reviewed whether the application of immunity may be available to architects while performing quasi-judicial arbitral functions, and held ultimately that the arbiter had unreasonably delayed acting pursuant to his appointment, and had thereby defaulted on contractual duties owed to the arbitration participants, causing damages as a result, and therefore was not entitled to arbitral immunity for actions arising from his conduct in breach of the tri-party arbitration agreement. *Id.*, at 1033-1034. *Cf.*, *Caudle* hypothetical, *supra*.

(9th Cir. 1994), citing *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1583 (9th Cir. 1987). However, in *City of Hayward* the Ninth Circuit determined that because the City had appointed the arbitrator pursuant to an ordinance mandating arbitration rather than by contract as a bona fide arbitral sponsoring organization, the City could be held vicariously liable for the arbitrator's actions. *Id. Cf., Kemner v. District Counsel of Painting and Allied Trades No. 36*, 768 F.2d 1115, 1119 (9th Cir. 1985) (plaintiff entitled to sue for relief directly against arbitration panel for acts taken "in excess" of the panel's jurisdiction).

In the Sixth Circuit arbitral immunity extends to insulate arbitrators from liability in legal actions "for those acts committed *while performing in his official capacity* [as arbitrator]." (Emphasis added) *See International Union, et al. v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1187 (6th Cir. 1983).[14] *Cf., Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982) ("it is appropriate that immunity be extended to arbitrators for acts *within the scope of their duties* and *within their jurisdiction* . . . where arbitration is *pursuant to a private agreement* between the parties") (Emphasis added).

None of these circuit court decisions can be reconciled with the holding of the Seventh Circuit in this case. In light of the varying standards for the imposition of the doctrine of arbitral immunity as espoused by the several circuit courts of appeal, IMG's petition should be granted to rectify such conflicts.

II. Certiorari Is Warranted Because The Decision Below Violates IMG's Rights Under The Privileges And Immunities, Due Process, And Equal Protection Clauses Of The 14th Amendment.

The Declaration of Independence states: "All men are created equal, [and] are endowed . . . with certain inalienable rights, [including] . . . liberty, and the pursuit of happiness."

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14. The *Greyhound* court "intimate[d] no view point, however, as to whether the doctrine of arbitral immunity would bar an action for *equitable relief* as well." (Emphasis added) *Id.*, at FN 10.

The right to enjoy liberty and pursue happiness is one of America's strongest foundations, and has been broadly construed to mean that private individuals have a right to be free from unreasonable government intrusion and interference in their daily lives and from the imposing activities of other third parties.[15] Section 2 of Article IV of the United States Constitution provides "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Section 1 of the 14th Amendment to the Constitution proclaims that no state "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of . . . liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws." In this case, the Seventh Circuit has exercised powers beyond those prohibited to the states by granting special court-made privileges, powers, and immunities to private citizens and companies acting as arbitrators and/or as organizations that sponsor arbitrations, in contravention of these constitutional principles and in violation of IMG's constitutional rights.[16]

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15. The guarantee of liberty

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See, also, Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 95 (1996).

16. This Court has recognized the "inherent dangers" in judge-made tort standards as a result of the

> undue rigidity which results from the unfortunate feeling, that any decision of a court creates a rule of law which, as law, is absolutely and eternally valid. . . . To regard a standard of conduct as fixed and immutable because judicially announced, is to create a standard which however

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The Constitution simply does not "tolerate classes among citizens," whether by insidious race classifications or merely because of a self-chosen occupation. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989). "No man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882). *See also Butz v. Economou*, 438 U.S. 478, 506 (1978). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 1 Cranch 137, 163, 2 L. Ed. 60 (1803).

With seeming insouciance to these constitutional principles, the Seventh Circuit has held the AAA, a private party who has allegedly injured another private party, "should be spared the burden of litigating *the appropriateness* of its *exercise of jurisdiction* . . . [and] . . . is immune from a suit based on *wrongful exercise of jurisdiction*." (Emphasis added) Appendix A, at 17a.[17]

It is uncontested the AAA is privately owned and operated, employs private individuals, and offers arbitration services to private contracting parties for a fee.[18] It is further uncontested that

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> just or even necessary at the time, may become a scandal and a hissing in the future.

Francis v. Southern Pac. Co., 333 U.S. 445, 453-454 (1948), citing Professor Bohlen, *Studies in the Law of Torts*, 610-611 (1926).

17. IMG can locate no federal case discussing a cause of action for "wrongful exercise of jurisdiction." *Cf., Bell v. Sellevold*, 713 F.2d 1396, 1404 (8th Cir. 1983); *Lotz Realty Co. v. United States*, 757 F. Supp. 692, 693 (E.D. Va. 1990); *United States v. Barnes*, 175 F. Supp. 60, 64 (S.D. Cal. 1959). *See, also*, Appendix A, at 17a, FN 4, and Appendix C, at 51a.

18. Although chartered as a "not-for-profit" company, such appellation does not absolve the AAA from the financial conflicts complained of here by IMG, as the fair implication is the AAA remains motivated, at least in part, by the receipt of income and revenue. *Cf., Tamari*, 552 F.2d at 780-781 (arbitrators were "volunteers" serving "at nominal pay").

IMG has not entered into any agreement to arbitrate any dispute. In its complaint, IMG alleges the AAA: demanded payment of money from IMG and asserted IMG was so obligated; issued "rulings" purporting to directly affect IMG's private rights and interests; and ordered IMG to travel from Indiana to Florida to participate in arbitration proceedings, pay AAA-selected arbitrators at hourly or daily rates established by those arbitrators, and submit to the decision of the arbitrator the propriety of IMG's involvement. *Complaint*, ¶¶ 29-37, 41, Exs. G-T. No one has disputed IMG's allegation the AAA clearly lacked any contractual or other legal authority to exercise such "jurisdiction" over IMG. Appendix A, at 12a, citing *AT&T*, *supra*, at 648-649.

According to the appellate court's ruling, IMG has no right to seek a stay or declaratory relief concerning these matters despite the holdings of this Court in *AT&T* and despite the AAA's repeated direct challenges to IMG to pursue such relief.[19] In addition, IMG has been denied any right to seek the recovery of damages caused by the AAA. The complaint alleges the AAA made material misrepresentations of fact and intended to deceive IMG; that in disregard of its rules (waived in favor of Ogdon), the AAA intended to profit from the arbitration proceedings and had a direct economic stake therein; that the directives and orders issued by the AAA were frivolous, unreasonable and groundless, and were pursued for an ulterior purpose and motive; and that IMG had been damaged as a result. *Complaint*, ¶¶ 29-37, 41, Exs. G-T. Except for the fact that

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19. The AAA's gauntlet was clearly and distinctly communicated, raising the question of whether the AAA had thereby waived any entitlement to assert the immunity doctrine as a defense. *See, e.g., Austin Mun. Securities, Inc. v. Nat'l Ass'n of Securities Dealers*, 757 F.2d 676, 691 (5th Cir. 1985) (waiver of immunity will be upheld if made intentionally, clearly and distinctly); *Ford Motor Co. v. Dept. of Treasury, State of Indiana*, 323 U.S. 459, 465 (1945) (state's immunity from suit under 11th Amendment may be waived by consent); *Copper S.S. Co. v. State of Mich.*, 194 F.2d 465, 467 (6th Cir. 1952) (implied waiver of immunity recognized, but should be clearly established).

IMG had made no arbitration contract, none of these allegations were considered by the Seventh Circuit in its decision.[20]

As private citizens whose power and authority derives solely from the consensual contract of others seeking their services, the AAA and its employees hold no unique qualifications or licenses to act as arbitrators or arbitration administrators. In this country they can obtain their power, quite literally, from an agreement scrawled on the back of a paper napkin. In the vast majority of cases they are not elected, certified, regulated or subject to any governmental authority or code of professional ethics. A Google.com internet search using the term "arbitration services" produces more than 800 links to over 590,000 webpages posted by various private individuals and companies from every conceivable corner of the nation who, like the AAA and its arbiters, offer private arbitration services to privately-contracting parties, for a fee. Consider as well local print advertisements published by arbitrators offering their services. Most are well-respected professionals within a given field of expertise, whether it be law, labor relations, the securities industry, or architecture, and the industry serves to employ and provide income for literally thousands of attorneys, retired judges, architects, and other specialists.

To become an arbitrator or "arbitral sponsoring organization," one only needs to declare and privately offer himself up as such. Thereafter, arbitrators and sponsoring bodies are free to establish the rules and conditions that will apply to the performance of their services. They are free to demand that contracting parties desiring their services accept such rules and conditions before proceeding with arbitration, and they are free to set the fees and compensation by which they will be paid. Of course, persons considering the retention of such services are reciprocally free to reject such rules and conditions, and to forego any decision to arbitrate.

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20. In reviewing a dismissal under Rule 12(b)(6), the court must read the complaint liberally in favor of IMG and accept as true all well-pled allegations and inferences that may reasonably be drawn from them. Appendix A, at 12a.

Under the Seventh Circuit's decision private arbitrators and arbitral bodies (and their respective staffs and employees) are deemed a special class of privileged and powerful citizens that can assess debt obligations, demand payments of money, cause economic or physical harm, and order all other U.S. citizens to travel unwillingly about the country, all without any legal authority or jurisdiction to do so, and without recourse. If such immunities are extended to the bounds permitted by this Court in *Mireles* (with respect to judges), arbiters could conceivably act maliciously and corruptly, in bad faith, and commit intentional torts, and they would be absolutely immune from a suit for damages or to enjoin further such actions, or even to declare the respective rights of the parties.

Imagine the AAA-appointed arbitrator in Miami who charges $2,000 per day for his services learning that IMG's president was in Florida vacationing with his family or attending a friend's daughter's wedding or an important business meeting, while Ogdon and his lawyers were sitting patiently in his office waiting to proceed with the AAA-ordered arbitration hearing against IMG, and then ordering two of his biggest staff members to "forcibly and with excessive and unreasonable force" seize IMG's president, cursing him and calling him vulgar and offensive names, and slamming him through the office doors so that the Ogdon arbitration could rightly proceed for as many $2,000 days as it would take to resolve the controversy under the tutelage of the arbitrator. *Cf.*, *Mireles*, *supra*, at 9 (where like occurrences were summarily held by the Court as not subject to legal recourse under the doctrine of judicial immunity). In light of the myriad of similarly horrifying fact patterns imaginable, the Court should grant IMG's petition to review the constitutionality of the Seventh Circuit's opinion under the facts alleged.

III. The Petition Should Be Granted To Prevent Abuse Of The Alternative Dispute Resolution System, And Because The Policy Reasons For Immunity Are No Longer Valid.

The judge-made law of judicial and quasi-judicial immunity has a long history in the federal and state courts, although this Court has never dealt directly with the doctrine of arbitral immunity.[21] This Court's "long line" of precedents acknowledging judicial immunity as identified in *Mireles* begins in 1872 with the case *Bradley v. Fisher*, 13 Wall. 335, 347, 20 L. Ed. 646 (1872). *Mireles*, *supra*, at 9. Like other forms of official or governmental immunity, judicial immunity is an immunity *from suit*, not just from an ultimate assessment of money damages. *Id.*, at 11, citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Recognizing the exceptions to immunity for actions not taken in a judicial capacity or for actions, though judicial in nature, taken in the complete absence of all jurisdiction, the Court in *Mireles* discussed the characteristics and distinguishing features of these acts, and indicated the relevant inquiry is the "nature" and "function" of the act, not the "act itself." *Id.*, at 12, citing *Stump v. Sparkman*, 435 U.S. at 362. This Court held that if a judge is performing the general functions "normally performed" by a judge, though in error, committed in bad faith, in "excess" of his authority, or even committed maliciously and corruptly, the judge is nevertheless entitled to maintain the immunity even if the judge orders court officers to commit a battery upon an attorney who was supposed to be in his courtroom, but was not. *Id.*, at 12.

The doctrine of arbitral immunity is typically referred to as a "qualified immunity," based upon the quasi-judicial nature of the acts performed by arbiters. The history of litigation aimed at arbitrators is fairly easily reviewed, for there are relatively few reported cases. The Seventh Circuit's *Tamari* decision from 1977, *supra*, appears to be the first in the federal appeals courts which

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21. Some courts refer to arbitral functions and activities as "'quasi-judicial,' . . . whatever that may mean." *See, e.g., Craviolini v. Scholer & Fuller Associated Architects*, 89 Ariz. 24, 27, 357 P.2d 611, 613 (1961).

actually granted an arbiter full immunity from suit. Subsequent leading circuit court opinions have been cited, above.[22]

A review made by the district court in *Hill v. Aro Corp.*, 263 F. Supp. 324, 325-326 (N.D. Ohio 1967), indicates the doctrine had its American roots in an 1880 case before the Iowa Supreme Court. *Id.*, citing *Jones v. Brown*, 54 Iowa 74, 6 N.W. 140 (1880). The *Hill* court also reviewed cases decided in various state courts, including Massachusetts, Maine, Minnesota, and New York.[23]

In addition to judges and arbitrators, courts have extended immunities to various other individuals acting in governmental or other official capacities.[24] *See, generally, Austin Mun. Securities, Inc. v. National Ass'n of Securities Dealers, Inc.*, 757 F.2d 676, 687-688 (5th Cir. 1985), and *International Union, et al.*

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22. *See also Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962) (architects acting as "quasi-arbitrators" may be held liable in tort for fraud or wilful and intentional misconduct; for inducing a breach of contract; for actions taken in bad faith and with intent to cause injury; or if not otherwise acting "within the scope of their authority"); *Cahn v. International Ladies' Garment Union*, 203 F. Supp. 191 (E.D. Pa.1962), *aff'd*, 311 F.2d 113 (3rd Cir. 1962) (arbitrator not entitled to immunity for "harassing" actions not arising out of the performance of appointed duties).

23. *Id.*, at 325-326, citing *Hoosac Tunnel Dock and Elevator Co. v. O'Brien*, 137 Mass. 424 (1884); *Hutchins v. Merrill*, 109 M.E. 313 (1912); *Melady v. South St. Paul Live Stock Exchange*, 142 Minn. 194 (1919); *Babalon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (Sup.Ct. 1956), *aff'd*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957).

24. The privileges have been applied to the President of the United States (*Nixon v. Fitzgerald*, 457 U.S. 731 (1982)), prosecutors (*Imbler v. Pachtman*, 424 U.S. 409 (1976)), legislators (*Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975)), legislative aides acting in their legislative capacity (*Gravel v. United States*, 408 U.S. 606 (1972)), executive branch officials acting as administrative law judges (*Butz v. Economou*, 438 U.S. 478 (1978)), prison administrators (*Procunier v. Navrette*, 434 U.S. 555 (1978)), hospital superintendents (*O'Connor v. Donaldson*, 422 U.S. 563 (1975)), school administrators (*Wood v. Strickland*, 420 U.S. 308 (1975)), and state executive officials (*Scheur v. Rhodes*, 416 U.S. 232 (1974)).

v. Greyhound Lines, Inc., 701 F.2d 1181, 1185 (6th Cir. 1983). In these cases the courts explain, ratify and/or adopt various policy reasons for granting immunities in favor of individuals who have allegedly done wrong, as against the presumed interests of the "victims" to seek redress or recourse through a judicial remedy, and have generally applied these policies as well to arbiters.[25]

None of these policy reasons apply to this case, however. Having made no contract to participate in the arbitration process, IMG in fairness should not be burdened with "immunities" granted in favor of other private individuals who have made the arbitration choice on their own terms. In this case, because Ogdon and IMG made no contract to arbitrate disputes between them, he had no right to initiate an arbitration proceeding against IMG. *AT&T*, 475 U.S. at 648. Faced with this clearly deficient demand the AAA had only two choices: "to proceed or not to proceed." In making that decision, the AAA needed no protection from undue influence, IMG was not a "dissatisfied litigant," and the AAA could have easily avoided being caught up in the "struggle" between Ogdon and IMG by choosing the passive option. The AAA could have easily decided not to proceed in the face of the absence of any contract authorizing its jurisdiction over IMG, and could have just as easily declined Ogdon's invitation to do so until presented with an order from an appropriate court compelling IMG to submit to arbitration.

25. *See, e.g., New England Cleaning, supra*, 199 F.3d at 545 (arbitral immunity is essential to protect decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants); *Caudle, supra*, 230 F.3d at 922 (arbitrators "have no interest in the outcome of the dispute between [the parties to the underlying contract], and they should not be compelled to become parties to that dispute"); *Tamari, supra*, 552 F.2d at 781 (individuals cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit). *Cf., Butz v. Economou*, 438 U.S. 478, 506 (1978) (personal action for damages against official who abused office may offer victim only "realistic method" for vindicating constitutional guarantees. Foreclosing victim's ability to bring suit increases the potential for lawless conduct); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971).

Although it is true the AAA and its arbiters may have had no interest in the outcome of any coverage dispute between IMG and Ogdon (or, more accurately, between Ogdon and Sirius), it cannot be argued the AAA and its arbiters did not have a direct financial interest *in the arbitral process itself*, as it is their very business to charge administrative fees and arbiter's fees for providing their respective services, the undertaking for which is the very method by which they make their livings, receive wages, and otherwise receive income to cover the costs of operations.

Except for Judge Easterbrook's *Caudle* hypothetical, *supra*, not a single case authority cited in this petition discusses the significance of the financial stake or financial interests of the arbiters in the arbitral process itself, or undertakes a complete balancing of the respective rights and conflicting interests which could develop as between an arbiter and a non-contracting party such as IMG. As the proponent for the application of the immunity doctrine in its favor, the AAA bears the burden of showing that such immunity is justified for the wrongful activities in question.[26] As part of meeting that burden, the AAA must show why IMG's private rights of redress for the injuries suffered at the hands of the AAA should be relegated to a subordinate position in favor of arbitral immunity.[27] In the proceedings below the AAA made no attempt to meet this burden.

The Court should therefore consider whether the doctrine of arbitral immunity should continue to exist at all, or be abolished as unnecessary. The principles of the doctrine were born of an age when integrity stood behind an agreement by handshake. In conducting business, people used ribbon typewriters, messy carbon paper, and inefficient and unreliable "snail mail." It is therefore not difficult to envision the need long ago for courts to

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26. *See, e.g., Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 622 (7th Cir. 2002), citing *Burns v. Reed*, 500 U.S. 478, 486 (1991).

27. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 31-32 (1980) (potential harm to public from denying immunity to private co-conspirators outweighed by benefits of providing remedy against private parties who participate in subverting judicial process and in so doing inflict injury on other persons).

"save" from collateral attack arbitrators who had volunteered their services to resolve disputes yet had neglected to memorialize in writing the conditions under which they would serve, including contractual protection from such collateral attack. In today's world of finger-tip word processing and instant electronic communication, however, arbitrators and arbitral sponsoring bodies can easily obtain by contract — as a condition to their agreement to serve — all of the "immunity" they need in the form of contractual waiver, release, and a simple covenant not to sue. The AAA has done just that, and has implemented and enjoys these very protections, by contract, under its own rules. What more does it need?

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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